It will be noted that of the five justices who voted for conviction in the *Olmstead* case, three were no longer members of the Supreme Court when the *Nardone* case was decided; and that the other two voted for conviction in the latter case. Only one of the four dissenting justices in the former case is no longer a member, and the remaining justices voted against conviction in the principal case. The justices who have since been appointed also voted against conviction in the principal case. The court now seems definitely committed to the proposition that evidence secured by the wire tapping of Federal agents is inadmissible in the Federal courts, but the policy of the doctrine seems questionable.

WILLIS R. DEMING

FIXTURES

PRIORITY OF LIEN—CONDITIONAL SALE CONTRACT OR CHATTEL MORTGAGE OVER REAL ESTATE MORTGAGE

The vendor installed two hot-air furnaces in a dwelling house, under a conditional sale contract, filed July 16, 1932, in which it was agreed that the furnaces should remain personal property, and removed two furnaces then upon the premises. The furnaces were held in place by their own weight and attached to pipes and ducts already on the premises. At the time of the installation the realty was mortgaged to the Central United National Bank of Cleveland, which mortgage the Home Owners' Loan Corporation paid on or about January 7, 1934, and took a first mortgage of the realty without actual notice of the conditional sale. In an action between the assignee of the contract and the Home Owners' Loan Corporation, the Court of Appeals held that the furnaces were a part of the realty, and that the mortgagee of the realty had a superior right to the furnaces. *Twentieth Century Heating & Ventilating Co.* v. *Home Owners' Loan Corporation*, 56 Ohio App. 188, 10 N.E. (2d) 229, 24 Ohio L. Abs. 56, 8 Ohio Ops. 237 (1937).

In order to determine the rights of a conditional vendor or chattel mortgagee and a mortgagee of the land it must first be ascertained whether the property covered by the agreement has lost its character as personalty and become a part of the realty. That, for so much as remains personal property, the vendor or chattel mortgagee has priority over the real estate mortgagee. See: *Chase Manufacturing Co.* v. *Garven*, 45 Ohio St. 289, 13 N.E. 493, 90 D.R. 501 (1887); *Keeler* v.

Keeler, 31 N.J. Eq. 181 (1879); *Pierce* v. *George*, 108 Mass. 78, 11 Am. Rep. 310 (1871). Courts, in considering whether a chattel has become a fixture, name one or more of the following tests: (1) mode of annexation, (2) appropriation or adaptation to the use of the realty, (3) the intention of the party making the annexation. This latter is an objective intention to be inferred from the nature of the article, the mode of attachment, the situation of the party making the annexation, and the purpose for which the annexation has been made. 1 Tiffany, Real Property, 2nd Ed., p. 905; *Teaff* v. *Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634 (1853). While a few cases hold that a hot-air furnace is not a fixture, *Rahway Savings Institution* v. *Irving Street Baptist Church*, 36 N.J. Eq. 61 (1882); *Towne* v. *Fiske*, 127 Mass. 125, 34 Am. Rep. 353 (1879), other cases, supported by the better reasons, find that it has become a part of the realty, because the furnace is essential to the use of the premises, and that it was annexed as a permanent improvement. *Stockwell* v. *Campbell*, 39 Conn. 362, 12 Am. Rep. 393 (1872); *Theilman* v. *Carr*, 75 Ill. 385 (1874); *Fuller-Warren Co.* v. *Harter*, 110 Wis. 80, 85 N.W. 698, 53 L.R.A. 603, 84 Am. St. Rep. 867 (1910); *Lenoir Land Co.* v. *Haynes Heating Co.*, 166 Tenn. 494, 63 S.W. (2d) 659 (1933). Although a chattel put upon realty has all the characteristics of a fixture, it will remain personalty, at least between the vendor and vendee, where it has been placed upon the premises under a chattel mortgage, conditional sale or other contract in which title is retained by the vendor. *Broaddus* v. *Smith*, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61 (1899); *Hewitt* v. *General Electric Co.*, 164 Ill. 420, 45 N.E. 725 (1896). However, courts are not in accord as to the effect this agreement has upon the rights of real estate mortgagees.

If the contest, in the principal case, had been between the plaintiff and the prior mortgagee, in the majority of jurisdictions, the plaintiff's right of removal would have been valid. 1 Jones on Mortgages, 8th Ed., p. 710; *Beatrice Creamery Co.* v. *Sylvester*, 65 Colo. 569, 179 Pac. 154, 13 A.L.R. 441, and note 448 (1919). Ohio has followed the rule that a chattel placed upon property under a chattel mortgage or conditional sale retains its character of personalty as against a prior mortgage on the real estate. *Hine* v. *Morris*, 7 Ohio D.R. 482, 3 Bull. 515 (D.C. 1878); *Gallett Rulli Co.* v. *Parish Brothers Co.*, 8 Ohio L. Abs. 702 (Ohio App. 1930); *East Ohio Bld'g & Loan Co.* v. *Holland Furnace Co.*, 48 Ohio App. 545, 194 N.E. 598, 2 Ohio Ops. 127, 17 Ohio L. Abs. 217 (1934). However, the real mortgagee has priority where the fixture has become an integral part of the realty, or,

where removal would cause material damage to the freehold or a substantial diminution of the mortgagee's original security. *Concrete Silo Co.* v. *Warstler*, 50 Ohio App. 334, 198 N.E. 189, 2 Ohio Ops. 204, 19 Ohio L. Abs. 161 (1935); *Detroit Steel Cooperage Co.* v. *Sisterville Brewing Co.*, 233 U.S. 712, 34 Sup. Ct. 753, 58 L. ed. 1166 (1914); *Dauch* v. *Ginsberg*, 214 Cal. 540, 6 Pac. (2d) 952 (1931). Courts state as reasons for protecting the chattel mortgagee or conditional vendor that the prior mortgagee has advanced nothing on the faith that such annexation would be made, and, where the chattel was sold under a conditional sale contract, that the mortgagor never acquired title; therefore, the mortgagee could not. *Binkley* v. *Forkner*, 117 Ind. 176, 19 N.E. 753, 3 L.R.A. 3 (1888); *Wurlitzer Co.* v. *Cohen*, 156 Md. 368, 144 Atl. 641 (1929). A few states have followed the so-called Massachusetts rule that the prior real estate mortgagee's rights are superior to those of the conditional vendor or chattel mortgagee. After the execution of the real estate mortgage it is not within the power of the mortgagor, by agreement with any third person, to deprive the mortgagee of articles affixed to the premises. *Clary* v. *Owen*, 81 Mass. 522 (1860); *Greene* v. *Lampert*, 274 Mass. 386, 174 N.E. 669 (1931); *Gaunt* v. *Allen Lane Co.*, 128 Me. 41, 145 Atl. 255, 73 A.L.R. 738, and note 748 (1929).

Where a fixture replaces another, which was a part of the realty when the real estate mortgage was executed, some courts have held that the conditional vendor or chattel mortgagee no longer has a right to remove the article. *Bass Foundry & Machine Works* v. *Gallentine*, 99 Ind. 525 (1885). Ordinarily this makes no difference, but the rights of the parties on account of the removal of the old fixtures will be equitably adjusted. *Bromich* v. *Burkholder*, 98 Kan. 261, 158 Pac. 63, L.R.A. 1916F 1275 (1916); *Omaha Loan & Building Ass'n.* v. *Bigelow*—Neb.—, 274 N.W. 574 (1937).

A chattel mortgage, conditional sale contract or other agreement, which stipulates that an article remain personalty, is valid against a subsequent mortgagee of the realty who has notice of the same. *Simons* v. *Pierce*, 16 Ohio St. 215 (1865); *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279 (1867); *Haven* v. *Emery*, 33 N.H. 66 (1856). But, in most jurisdictions, the subsequent mortgagee of the realty, without actual or constructive notice of the conditional sale contract or chattel mortgage, is not bound by the agreement. 1 Jones on Mortgages, 8th Ed., p. 713; *Brennan* v. *Whitaker*, 15 Ohio St. 446 (1864); *Case Manufacturing Co.* v. *Garven*, *supra*. The vendor consents, at least impliedly, to the annexation, which justifies the mortgagee's relying on the fixture

for security. *Davenport* v. *Shants*, 43 Vt. 546 (1870). A few courts have protected the conditional vendor against the subsequent real estate mortgagee, who had no notice of the agreement. *Baldwin* v. *Young*, 47 La. Ann. 1466, 17 So. 883 (1895); *Adams Machine Co.* v. *Interstate Bld'g. & Loan Ass'n.*, 119 Ala. 97, 24 So. 857 (1898). In the latter case the court said that the subsequent mortgagee owes a "duty of inquiring and ascertaining for himself, as must every purchaser of chattels, the title of the vendor or mortgagor."

According to the weight of authority, filing or recording of a chattel mortgage or conditional sale contract is not constructive notice to the subsequent mortgagee of the realty to which the fixture is annexed. *Brennan* v. *Whitaker*, *supra*; *Case Manufacturing Co.* v. *Garven*, *supra*; *Brunswick-Balke Collender Co.* v. *Franzke-Schiffman Realty Co.*, 211 Wis. 659, 248 N.W. 178 (1933). Courts have pointed out that it is the policy of the law that instruments relating to real estate should appear in real estate records, and that the prospective mortgagee of the realty cannot be expected to search records relating to personal property. *Phillips* v. *Newsome*, 179 S.W. 1123 (Tex. Civ. App. 1925); *Tibbetts* v. *Horne*, 65 N.H. 242, 23 Atl. 145, 15 L.R.A. 56 (1889). However, in a number of jurisdictions, filing or recording of the chattel mortgage or conditional sale is constructive notice. *In re Atlantic Beach Corp.*, 244 Fed. 828 (D.C. Fla. 1917); *Liddell Co.* v. *Cork*, 120 S.C. 481, 113 S.E. 327, 23 A.L.R. 800, and note 805 (1922); *Sword* v. *Low*, 122 Ill. 487, 13 N.E. 826 (1887). Where this rule is followed failure to record or improper recording gives the subsequent mortgagee priority to fixtures over the chattel mortgagee or conditional vendor. *Continental Gin Co.* v. *Sims*, 103 Okla. 191, 229 Pac. 818 (1934); *Cunningham* v. *Cureton*, 96 Ga. 489, 23 S.E. 420 (1894). In the states where recording of the chattel mortgage or conditional sale is constructive notice, and where the Uniform Conditional Sales Act has been adopted (Alaska; Arizona; Delaware; Indiana; New Jersey; New York; Pennsylvania; South Dakota; West Virginia; Wisconsin, 2 U.L.A. Supp. Pg. VII the subsequent mortgagee's right to fixtures is superior, if removal would cause material injury to the freehold. *Lasch* v. *Columbus Heating & Ventilating Co.*, 174 Ga. 618, 163 S.E. 486 (1932); *Lumpkin* v. *Holland Furnace Co.*, 118 N.J. Eq. 313, 178 Atl. 788 (1935). The Uniform Conditional Sales Act, 2 U.L.A. Sec. 7, p. 12, provides that the conditional vendor, in order to have a right to fixtures against the subsequent mortgagee of the realty, must file the contract in the office where a deed of the realty would be recorded or registered. Excluding the states where this act or

a similar statute is in force, or where filing or recording of the chattel mortgage or conditional sale contract is constructive notice, in the majority of jurisdictions, the only methods suggested for protecting the vendor of personal property, that will be affixed to realty, are to take a real estate mortgage of the property, properly recorded, *Brennan* v. *Whitaker, supra; Tibbets* v. *Horne, supra,* or to perfect a lien upon it under the Mechanics' Lien Law. *Garven* v. *Hogue & Donaldson,* 14 W. L. Bull 175 (Ohio C.C. 1885).

Although a mechanic's lien would afford protection for the erecting of fixtures upon property, it would not create a lien upon the separate articles for the purchase price. Ohio G.C. 8310. The suggestion in the Ohio cases, *Brennan* v. *Whitaker, supra; Garven* v. *Hogue & Davidson, supra,* of perfecting a lien upon fixtures by a real estate mortgage, while affording security to the vendor against a subsequent mortgagee, is, in effect, precluding the use of conditional sale contracts of articles affixed to the realty. In the writer's opinion, there is a real need for legislation similar to Section 7 of the Uniform Conditional Sales Act, 2 U.L.A. 12, providing constructive notice to subsequent mortgagees or purchasers, by filing the contract in the office of the records of realty. With such a statute, in case of doubt whether the property, as affixed, is a chattel or fixture, the vendor could file two contracts, just as he can in a sale by mortgage file both a chattel and real estate mortgage upon the article.

ITHAMAR D. WEED

MUNICIPAL CORPORATIONS

LIABILITY OF MUNICIPAL CORPORATIONS FOR UNEMPLOYMENT INSURANCE

With the enactment of the Ohio Unemployment Compensation Act (Ohio Gen. Code 1345-1—1345-35), the municipalities of this state have been faced with a perplexing situation. The Act, in providing for exemptions, has defined the term employment as not including "service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of *purely governmental functions.*" In thus dealing with the government employee Ohio has adopted an unique course; the other states have in all instances framed their statutes so as to give complete exemption to